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No. 02-182

IN THE

Supreme Court of the United States

STATE OF GEORGIA,
Appellant,

v.

JOHN ASHCROFT, *et al.*
Appellees,

and

PATRICK L. JONES, *et al.*
Intervenors.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF THE STATE OF GEORGIA

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REPLY BRIEF OF THE STATE OF GEORGIA

ARGUMENT

I. APPELLEES OFFER NO ARGUMENT IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 5 AS CONSTRUED BY THE DISTRICT COURT

With little exception, the briefs of both the federal appellees and the intervenors avoid the substantive legal issues before the Court. Appellees' inability to meet the constitutional issue presented by the lower court's interpretation of § 5 is especially glaring.

The district court held that Georgia is compelled by § 5 to redistrict in a way that will maintain a preexisting number of "safe" or "robust" seats, so long as demographics permit such lines to be drawn. The majority rejected Georgia's contention that districts were legally permissible under § 5, just as they are under § 2, if minorities maintained a "fair or equal opportunity" to win those districts. As Judge Edwards wrote in his opinion, joined by Judge Sullivan: "[A] state that converts a safe district into one where African Americans have only a 'fair opportunity'" runs afoul of § 5. (J.S. 152a). Because Georgia "merely" adopted "a plan that preserve[d] an 'equal or fair opportunity' for minorities to elect candidates of their choice," preclearance was denied. *Id.* 151a.

Both § 2 and § 5 of the Voting Rights Act derive their constitutional authority from the power of Congress to protect minority voters from discrimination. *Lopez v. Monterey County*, 525 U.S. 266 (1999); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 301 U.S. 315 (1966). Here, however, the district court required Georgia to adopt a redistricting plan that went beyond the adoption of a *nondiscriminatory* plan, requiring instead the drawing of safe or "robust" seats. It is by this holding that the district court expanded § 5 beyond the parameters of the Constitution. The constitutional basis for § 5 would be lost if the statute were construed to mandate not only a nondiscriminatory redistricting scheme, but one that also includes safe minority districts. That is particularly true where the sole reason for requiring those safe seats is the mere fact that such high BVAP seats happen to have existed at the time of the 2000 census.

Appellees offer no hint of constitutional authority that might support such an expansive application of § 5. The DOJ's brief merely notes that § 5 has been previously upheld against a *general* challenge and then goes on to state that the issue "creates no constitutional concern." (DOJ Brief, p. 39).

The DOJ's inability to cite *any* authority for its position on this issue speaks volumes. Its silence follows inevitably from the fact that there is no such authority in this Court's prior decisions.

Intervenors similarly provide no constitutional support for the district court's construction of § 5. Neither do they offer any reason why this Court should adopt such a radical interpretation of the Constitution.

II. THE DISTRICT COURT'S INTERPRETATION OF SECTION 5, REQUIRING GEORGIA TO DRAW SAFE MINORITY SEATS, IS INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

A. Appellees Offer no Authority for Interpreting Section 5 as the District Court Did Here.

The Attorney General contends that the "district court in this case broke no new ground." (DOJ Brief, p. 20). In truth, what the district court required of Georgia is unprecedented. Never has this Court required that a jurisdiction draw *safe* seats—or *robust* seats—in any context. Safe minority seats have not been required as a remedy in litigation; they have not been required by any constitutional principle; they have not been required under § 2 of the Voting Rights Act; and they have not been required under § 5 of the Voting Rights Act. *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996); *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976). Moreover, in those instances where states have enacted redistricting plans to create safe districts, this Court has

stricken such plans as unconstitutional.[1] *Bush v. Vera*, *supra*; *Miller v. Johnson*, 515 U.S. 900 (1995).

For appellees to suggest that the holding of the majority below is in line with this Court's voting rights jurisprudence simply ignores this Court's decisions. Requiring Georgia to draw safe minority seats stretches § 5 to a new and unprecedented extreme that is divorced from the goal of interracial politics that underlies the Voting Rights Act. *See Johnson v. DeGrandy, supra*. The district court's interpretation of § 5 unavoidably raises a substantial constitutional question, which alone is a compelling reason to reject its construction of the statute:

> When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

This long-standing rule dictates reversal of the judgment below and adoption of Judge Oberdorfer's well-reasoned interpretation of § 5.

Appellees' entire legal argument in support of the district court's ruling boils down to their incantation of the principle that § 5 is designed to avoid "retrogression." That argument is unavailing here, however, for several reasons, not the least of which is that requiring safe seats conflicts with everything this Court—and Congress—has previously written regarding the rights of minority voters to an *equal* opportunity to

[1] An integral part of those decisions, of course, was the finding that the district lines at issue were predominantly based on race. In this instance, the sole reason why Georgia's 2001 Senate plan was rejected by the court was race. The interim remedial plan adopted in 2002 to address the court's ruling was changed solely to increase the BVAPs in the original plan.

participate in the political process. Under this view of § 5, a state's redistricting prerogatives are defined largely by what districts happen to be in place at a given time, rather than what is or is not a discriminatory plan.

Appellees' argument also founders on its own self-contradictions. As the DOJ notes in its brief, the district court did not require that the very high existing BVAPs be maintained at the same levels in every district. (DOJ Brief, pp. 29-38). To the contrary, the court and the DOJ permitted BVAP reductions in many districts, so long as the likelihood of minority victory remained "robust." (*Id.* App. A). These reductions were often substantial, exceeding 10%, 20% and even 30% in districts with the highest minority populations. *Id.* Obviously, all of these district reductions had some adverse impact on the likelihood of a minority preferred candidate winning in those particular districts. Even in the complete absence of racially polarized voting—much less "severe" polarization—the likelihood of a minority preferred candidate winning inevitably decreases as the minority VAP decreases in the district.

The DOJ's acquiescence in the view that § 5 permits such reductions is not surprising. The only alternative—arguing that any BVAP reduction is illegal retrogression—is patently untenable. Under that view, there would be § 5 prohibited "retrogression" with a BVAP reduction from 85% to 60%[2] because that would necessarily cause some reduction in the likelihood of minority candidate victory.

By acknowledging that a substantial BVAP reduction can be enacted without violating § 5, appellees admit the very point they supposedly take issue with—namely, that some reductions in minority electoral control in majority-minority districts are permissible under § 5. Once acknowledging that

[2] This BVAP reduction occurred, for example, in H.D. 70. (DOJ Brief, App. A).

such reductions are permissible, appellees have stepped onto the slippery slope. The issue is not whether *any* decrease in minority voting strength is permitted in majority-minority districts. The real issue is how much minority control must be maintained in order to satisfy § 5. Under the district court's safe seat/robust seat threshold for § 5 retrogression compliance, the opportunity for minority victory can be reduced from certainty to a point where a district appears safe, or robust. But it cannot be reduced to the point where minorities have an equal opportunity.

By drawing the line at the safe/robust seat threshold, the district court has picked an arbitrary point on the continuum of likely electoral success. And by taking this approach—rather than adopting a strict "no reduction" interpretation of § 5—the court and appellees endorse the same conceptual approach to applying § 5 to redistricting plans as the State of Georgia advocates. The only difference is where the line is drawn for minority electoral strength, below which there is illegal retrogression.

The district court's picking of the safe seat point of political strength is completely arbitrary. It has no precedent in the case law and none in the statute. Moreover, appellees' construction of § 5 would place that statute at odds with § 2. In the context of redistricting plans, it is well settled that § 2 requires only the adoption of nondiscriminatory plans that provide equal opportunity at electoral victory and equal access to the political process. *Johnson v. DeGrandy, supra*; *Thornburg v. Gingles, supra*.

Appellees provide no rationale that would justify construing the substantive dictates of § 5 more broadly than those of § 2. If anything, the opposite should be the case because of the limited purpose of § 5. *See, e.g., Reno v. Bossier Parrish*, 528 U.S. 320 (2000); *Beer v. United States*, 425 U.S. 130 (1975). While § 2 and § 5 have different procedural reach, § 5 should not be construed to impose

broader *substantive* restrictions on a state's redistricting prerogatives than § 2.

B. The Other Assertions Advanced by Appellees Provide no Support for the District Court's Holding.

Several of appellees' other points will be addressed briefly here.

The relationship between § 2 and § 5. This Court has held that a covered jurisdiction need not prove compliance with § 2 in order to receive § 5 preclearance. *Reno v. Bossier Parrish School Bd.*, 520 U.S. 471 (1997). From this, appellees incorrectly contend that it is irrelevant that Georgia enacted nondiscriminatory redistricting plans in 2001. (DOJ Brief, pp. 21-28). Appellees misapply this Court's holding in *Bossier Parrish*. Nothing this Court said there implies that § 5 can prohibit the adoption of a nondiscriminatory election plan.

The benchmark districts. The DOJ obfuscates the issues before the Court by suggesting that the State and Judge Oberdorfer seek to compare Georgia's new 2001 redistricting plan with some "hypothetical" plan, rather than with the pre-existing "benchmark." (DOJ Brief, pp. 27-28). That is incorrect. Since the complaint was first filed in this case, Georgia has recognized that the newly enacted redistricting plans must be compared to the existing ones under § 5. What Georgia has contended is that the legality of the new plan should look to whether the preexisting minority electoral opportunities were preserved at a legally satisfactory level. Appellees and the district court do the very same thing. They would simply draw the line below which a minority-majority district cannot fall at a higher level—specifically, the safe seat threshold.

The elimination of preexisting majority black districts. The DOJ asserts that the district court's ruling permits the elimination of majority black districts "based on proof that the dispersion of black voters would increase black electoral strength in other districts." (DOJ Brief, p. 35). All that statement means, however, is that a given safe seat can be eliminated *if* another one is created elsewhere. While the district court did not hold that the same exact geographical areas must be configured into the same safe districts to avoid retrogression, it certainly did hold that the total number of safe districts cannot be reduced if it is demographically possible to maintain or increase the number of such districts.

Majority BVAP districts in Georgia. The DOJ's brief mistakenly asserts that one of the districts at issue fell slightly below 50.0% BVAP in the State's proposed plan. (DOJ Brief, p. 6 & n. 3, referring to S.D. 2). While the 0.2% difference is of little moment, the DOJ's factual assertion is contrary to the undisputed evidence. S.D. 2 was maintained as a majority-minority district, both by BPOP and BVAP.

The 2000 census was the first census that permitted respondents to self report as a member of more than one racial category. In its tabulation of the total BVAP, Georgia counted multiple race respondents who combined black with any other minority race as part of the BVAP or BPOP. Georgia adopted its practice only after the Director of its Reapportionment Office heard a presentation to this effect by Joseph D. Rich, Chief of the Voting Rights Section of the DOJ. (Meggers Depo., 1/3/2002, pp. 18-19). Georgia learned for the first time during this litigation that the DOJ now contends that a multiple-race responder is "black" for BPOP/BVAP purposes only if that person reported that he/she was black in combination with "white." If the responder claimed "black" in combination with any other race—be it Asian, American Indian, Chinese, etc.—the DOJ does not count them as "black."

When Georgia realized the DOJ would advocate this unorthodox counting technique in this case, the State retained as an expert Dr. Roderick Harrison, the former Chief of the Racial Statistics Branch of the U.S. Census Bureau. Dr. Harrison's report established, without contradiction, that Georgia's approach was correct and that the DOJ position was baseless, arbitrary and irrational.[3] As he concluded, in light of the "empirical evidence, it seems arbitrary and *ad hoc* to adopt the [DOJ] rule." (P. Ex. 26, p. 15). The district court never resolved this dispute nor addressed the fact that there was no evidence to support the DOJ's position. Instead, the majority simply stated that it would consider "all of the evidence," without saying which version was entitled to more weight or providing any other clarification. (J.S. 117a). In fact, the evidence is undisputed that Georgia's approach is appropriate. S.D. 2 was a majority-minority BVAP district as redrawn in 2001.

III. APPELLEES OFFER NO LEGAL BASIS FOR ALLOWING PRIVATE INTERVENTION IN A SECTION 5 PRECLEARANCE PROCEEDING.

A. The Issue of Intervention Remains a Present Dispute that Should be Decided by this Court.

The DOJ suggests that this Court should deem the issue of intervention "moot" and avoid it. (DOJ Brief, pp. 40-42). Intervenors, like the State of Georgia, believe that the issue is properly presented in this appeal and should be decided.

Intervention is not a moot issue here. Mootness generally refers to the absence of an Article III case or controversy that

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[3] The DOJ did not, and could not, introduce any evidence in support of its approach. It simply sought to rely at trial on its purported "guidance" on tabulation of black population, a discussion that was ambiguous in its own right. As Georgia argued below, the DOJ's "guidance" had never even been subjected to notice and comment under the APA. *See* Georgia's Post-Trial Findings of Fact, pp. 216-21.

arises during the course of litigation because a party has obtained the relief it sought, has abandoned its claim, or the like. *See generally Honig v. Doe*, 484 U.S. 305, 317 (1988); *Friends of the Earth, Inc. v. Ladlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 189-90 (2000). Nothing about the present case is "moot." The State of Georgia is involved in an active controversy with the Attorney General, and the State is equally involved in a *present* dispute with the intervenors. Substantively, the scope of the dispute between Georgia and the intervenors is exactly the same as the State's dispute with the Attorney General precisely because the district court allowed these private intervenors to carry the same mantle of authority as the Attorney General. The dispute between the State and the intervenors is no more "moot" than is the dispute between Georgia and the Attorney General himself.

The vitality of the ongoing dispute between intervenors and the State of Georgia is apparent not only from their opposing positions on the substantive issues in this case, but from the prior history of this case as well. As noted previously, intervention in the district court prevented any meaningful opportunity for settlement, and it even prevented the district court from entering a consent order regarding the redistricting plans for Congress and the Georgia House of Representatives to which the DOJ had no objection. (Georgia Brief, pp. 42-43). The posture of the case today is the same. There is always the possibility of settlement of a case, even when it is on appeal. But here, the continued presence of the intervenors makes that impossible today, just as it did in the district court.[4] Similarly, while Georgia believes that the

[4] In addressing the continuing impact of intervention in this case, Georgia does not mean to suggest that there is an immediate likelihood of settlement between the original parties if there were no longer intervenors. To the contrary, settlement was never discussed after it became clear in the trial court that a settlement could not occur so long as the intervenors were present.

judgment in the district court should be reversed outright, the continued presence of the intervenors in the event the case were remanded to the district court for any purpose would present an ongoing controversy over the propriety of intervention itself.

While this Court has on many occasions articulated jurisprudential considerations that counsel against reaching issues that are not necessary to a decision, those considerations do not apply here. *See, e.g., Ashwander v. TVA*, 297 U.S. 288, 342-49 (1936) (Brandeis, J., concurring). Moreover, practical considerations weigh heavily in favor of deciding the issue of intervention. For years, § 5 intervention has been decided differently by different panels of the District of Columbia District Court. *See, e.g., State of Georgia v. Reno*, 881 F.Supp. 7 (D.D.C.), *aff'd sum.*, 516 U.S. 1021 (1995)(denying intervention). The issue of intervention was even decided differently at different times by the district court here. (Georgia Brief, pp. 41-42).

Very few § 5 preclearance actions are brought in the District of Columbia because of the tremendous expense involved in the prosecution of such actions. Deterred by the cost of litigation, jurisdictions frequently acquiesce in whatever the Attorney General rules in an administrative submission. A substantial part of the cost concerns of covered jurisdictions (which include hundreds of local governmental bodies that have serious financial constraints) is the fear that intervenors will expand the proceedings beyond what the Attorney General himself might assert, just as occurred here. The issue of private intervention in § 5 proceedings is an issue that should be resolved, and it is properly presented in this case.

B. Private Intervention is Plainly Inappropriate in a Section 5 Action.

Appellees' briefs confirm that private intervenors have no legally cognizable right or interest that could be impaired by the disposition of this case. Intervenors simply state that they have a "significant interest" in the preclearance of the election districts, as if their invoking the phrase suffices. Intervenors ignore the essential fact, however, that they have no legal right or private interest in a § 5 proceeding. What federal rights they may have to challenge voting practices derive from the Constitution and § 2 of the Voting Rights Act. A successful § 5 action impairs no rights of would-be intervenors:

> Neither an affirmative indication by the Attorney General that no objection would be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. 42 U.S.C. §1973c.

Intervenors cite several voting cases in which parties appeared as intervenors, but it appears that in most, if not all of those cases, intervention was not even a contested issue. Moreover, in each of those cases, there had been district court challenges in the respective states that preceded the applicants' intervention in the § 5 cases. Arguably, those intervenors might have had some "legal interest" arising from their other litigation.[5] More fundamentally, however, § 5

[5] *See, e.g., City of Richmond v. United States*, 422 U.S. 358, 364-65 (1975) (intervenor had twice challenged the legality of the city's proposed annexation prior to Richmond's preclearance action); *United States v. Mississippi*, 444 U.S. 1050, 1051 (1980) (intervenors were parties to a prior challenge pending in Mississippi); *Beer v. United States*, 374 F.Supp. 363, 367 n.5 (D.D.C. 1974) (intervenors were plaintiffs in a pending constitutional challenge to the same districts); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983) (intervenors had prior pending litigation challenging the city's plan and successfully enjoined the use of the voting change at issue in the preclearance action).

preclearance proceedings are uniquely inappropriate for private intervention. Section 5 is the most extreme intrusion into state prerogatives that has been enacted by Congress and upheld by this Court in over 100 years. Transferring the power to oppose a covered jurisdiction's declaratory judgment action from the Attorney General to a handful of private persons cannot be squared with the unique purposes of the statute. *See Morris v. Gressette*, 432 U.S. 491 (1977).

The court's expansive view of its own role, as well as that of intervenors, is not only inconsistent with § 5. It also conflicts with the way civil actions proceed in the district courts generally. Where a defendant—here, the Attorney General—takes no issue with the claims or assertions of a plaintiff, judgment on those claims in favor of the plaintiff is appropriate. The district court refused to follow that normal procedure here, however, and instead took on a much broader role:

> [T]he Attorney General has not objected to two of three redistricting plans proposed by the State of Georgia, and yet the State has come to this court seeking judicial—and not administrative—preclearance of all three plans. The United States and intervenors argue that the United States' failure to object to the two plans does not justify entry of declaratory judgment because the State retains the burden of proof and because the objections of intervenors preclude entry of a declaratory judgment . . . . In asking this court to enter a declaratory judgment as to all three plans, it imposes on this court an affirmative duty to inquire whether the plans have the effect or purpose of denying or abridging the right to vote on account of race or color. Furthermore, the State assumes the burden of demonstrating by a prepon-

derance of the evidence that such a declaratory judgment is warranted.

* * * *

The State cannot point to the Attorney General's apparent acquiescence—a circumstance relevant under the statute when administrative preclearance is sought—to justify a grant of judicial preclearance . . . .

* * * *

Indeed, the very structure of the declaratory judgment procedure, under which the Court, and not the Attorney General, is vested with the final authority to approve or disapprove the proposed change as a whole, argues conclusively against the State's suggestion. (J.S. 103a-106a).

The district court's approach would rewrite § 5 in a way that only Congress might do. Indeed, where Congress has intended that a district court should go beyond the contentions and admissions of the Attorney General and the opposing party and embark on a broader inquiry, Congress has explicitly stated exactly that and provided for intervention as a means for opposing a proposed consent judgment. An example of that type of procedure is the 1974 amendment to the antitrust laws which rewrote the normal procedures for entering consent judgments to allow for the kind of broad review and public participation the district court assumed here. *See* 15 U.S.C. § 16(b)–(f). Under the antitrust statute, proposed consent judgments are subjected to public comment. The trial court is then charged with making an *independent* determination of whether the proposed judgment "is in the public interest," and certain considerations the court should address are specified in the statute. 15 U.S.C. § 16(e). Congress further authorized the district court to appoint a special master or permit "participation in proceedings before the court by interested persons," including participation by way of "intervention as a party." 15 U.S.C. § 16(f).

Here, the district court proceeded as if Congress had provided a similar charge to look beyond the contentions and admissions of the State and the Attorney General, but § 5 provides nothing of the sort. Had Congress intended that preclearance actions proceed in the manner assumed by the lower court, Congress would surely have stated that either when it enacted § 5 or when it extended the law in 1970, 1975, or 1982—just as Congress so stated when it amended the antitrust laws. Undeterred by the absence of congressional authority in this case, the district court allowed intervenors to take over the role of the Attorney General even where he took no issue with Georgia's position.[6] Private intervention in § 5 actions is plainly inappropriate as a matter of law, particularly where the intervenors are allowed to expand the claims, issues and evidence defined and presented by the plaintiff and the Attorney General.[7]

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[6] One might ask whether private intervenors could similarly trump the position of the Attorney General when he *disagreed* with the position of the covered jurisdiction—i.e. allow intervenors to acquiesce in preclearance over the Attorney General's opposition. There is no less reason to allow that to occur than what the district court permitted here.

[7] Intervenors take issue with Georgia's statement that *Apache County v. United States*, 256 F.Supp. 903 (D.D.C. 1966), held intervention inappropriate under § 4 of the Voting Rights Act because of the Attorney General's unique statutory role. (Intervenors' Brief, p. 38 n 31). However, that was the explicit rationale of the district court in denying intervention in that case. While the court did not state that intervention might never occur under the Voting Rights Act, the court reasoned that "the right enforced by [the statute] is a public right, appertaining not to individual citizens, but to the United States itself." *Id.* 906. Furthermore, *Apache* noted that the structure of § 5 makes preclearance proceedings even more inappropriate for private intervention because the Attorney General has the unrestricted power to preclear voting changes on his own. *Id.* 907-08.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's principal brief, the State of Georgia respectfully requests that the Court reverse the April 5, 2002, judgment of the district court and direct that court to enter judgment preclearing the 2001 Senate plan at issue.

Respectfully submitted,

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